

American Prosecutors and Prosecutorial Discretion

INTRODUCTION

In recent weeks and months, the role of the prosecutor and prosecutorial discretion have been thrust into national headlines by events across the United States. In Ferguson, Missouri, prosecuting attorney Robert McCulloch has come under fire for his decision to take the case surrounding the shooting of Michael Brown by police officer Darren Wilson to a grand jury, instead of filing a criminal information himself.¹ On a more national scale, President Barack Obama has cited prosecutorial discretion as justification for his executive action providing legal status to thousands of undocumented immigrants who are in the United States illegally, claiming the doctrine gives him the authority to take such action. With these events and others, one might ask, “What is prosecutorial discretion, and why is it so important?” This document will explain briefly the history of the American prosecuting attorney, and the development and scope of the power of prosecutorial discretion.

ISSUES

What is the origin of the office of prosecuting attorney as we know it in the United States today? From where do prosecutors draw their broad discretionary powers (*i.e.*, the authority to file or withhold filing of criminal charges, prosecution of particular individuals, initiation of criminal investigations, etc.), and what is the scope of and limitation to those powers?

CONCLUSION

The American office of prosecuting attorney has its origins in American adaptations of Dutch and English law. State judiciaries developed the office of Attorney General, and the position later grew into a local, elected position as law enforcement and government became

¹ In Missouri, a prosecuting attorney has the authority and discretion to either file an information himself, or seek an indictment from a grand jury. MO. CONST. ART. 1, § 17; MO. ANN. STAT. § 545.010. Indiana prosecutors have the same authority and discretionary power. I.C. § 35-33-7-3.

more localized. Prosecutorial discretion itself is derived from the United States and state constitutions, but case law is primarily responsible for the doctrine's development. While the office and duties of the prosecuting attorney are statutorily defined, the broad powers and authority wielded by the prosecutor were spawned via development of the common law.

DISCUSSION

I. BACKGROUND

A. Historical Origins of the American Prosecuting Attorney

There is some debate over the exact way in which the American prosecutor came to be. What is clear is that the American prosecutor has no apparent roots in British common law, as American law developed a system of public prosecution. The local prosecutor or district attorney appears to be “a distinctive and uniquely American contribution...whereas Americans typically describe their legal system as based upon English common law, in terms of both its procedural attributes and substantive penal codes, the public prosecutor is a figure virtually unknown to the English system, which is primarily one of private prosecution to this day.”² The English system of private prosecution never took root in the American colonies, as Connecticut had already established a system of public prosecution by 1704. All other colonies would follow soon after.³

A combination of factors allowed the American legal system to develop in its own unique way. The independent spirit of the American colonists, the geographic distance between the American colonies and England, and England's relative disinterest in enforcing British norms

² Jack M. Kress, “Progress and Prosecution,” *Annals of the American Academy of Political and Social Sciences* 423 (January 1976), 99-116.

³ Joan E. Jacoby, *The American Prosecutor: A Search for Identity*, Lexington Books, D.C. Heath and Company (1980).

once the judiciary was established by authority of the crown.⁴ From 1600 to 1750, the colonies began to adopt and adapt the English and Dutch judicial systems to suit local needs. The Dutch judicial officer, the *schout*, whose duties in court were to present criminal charges against alleged criminals, served as the precursor to the American Attorney General.⁵ Though the title of *schout* disappeared, the officer's function continued and was merged with the English office of sheriff. After this merger of duties, the Attorney General functioned as a police-prosecutor hybrid.⁶ This position remained an appointed position for many years.

In 1789, the first Judiciary Act established the first federal prosecutor.⁷ The Judiciary Act vested federal prosecutors with the exclusive power to bring federal criminal prosecutions.⁸ Though the American system was a break with the English tradition of private prosecution, the vesting of the power of prosecution in the state was not entirely unique to America, as Germany also bans private prosecution for the most part.⁹ However, the German system does provide significantly more structure, guidance, and control over prosecutorial discretion, as German criminal law contains rules of compulsory prosecution.¹⁰ In contrast, “[n]o combination regime restrains American prosecutors.”¹¹

Over the next one hundred years, the increase in American democratization and localization in state government lead to increasing power and duties of local deputy state attorneys general. As appointive offices began to be replaced by elective offices, the American

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ See Judiciary Act of 1789, ch. 20, § 35, 1 Stat. 73, 93 (“And there shall be appointed in each district a meet person learned in the law to act as attorney for the United States in such district, ...whose duty it shall be to prosecute in such district all delinquents for crimes and offences, cognizable under the authority of the United States....”).

⁸ *Id.*

⁹ See John H. Langbein, *Controlling Prosecutorial Discretion in Germany*, 41 U. CHI. L. REV. 439, 443 (1974).

¹⁰ *Id.*

¹¹ Rebecca Krauss, *The Theory of Prosecutorial Discretion in Federal Law: Origins and Development*, 6 SETON HALL CIR. REV. 1 (2009).

public prosecutor as we know it today was born. During this time, there was also a shift in the minor judicial status of a prosecuting attorney toward a quasi-judicial, executive function as a chief law enforcement officer.¹² Today, the public prosecutor in the American system performs “two primary functions. One is *investigatorial*—evidence gathering—and this has no firm border with the higher levels of the policing function. The other is the *forensic* prosecutorial role—presenting the evidence to the trier (incident to which has developed the power to decide whether to prosecute).”¹³

B. Office of the Prosecuting Attorney in Indiana

In Indiana, the office of prosecuting attorney is established by the Indiana Constitution.¹⁴ Generally speaking, prosecutors are afforded broad discretion in carrying out their assigned duties,¹⁵ which are statutorily defined in Title 33, Article 39 of the Indiana Code.¹⁶ This discretion includes decisions concerning the options available in a criminal case, including (but not limited to) whether to file criminal charges,¹⁷ what particular charges are to be filed,¹⁸ when the charges are to be filed,¹⁹ who should be prosecuted,²⁰ whether a plea-bargain should or

¹² Joan E. Jacoby, *The American Prosecutor: A Search for Identity*, Lexington Books, D.C. Heath and Company (1980).

¹³ 17 Am. J. Legal Hist. 313 (1973).

¹⁴ IND. CONST. ART. 7, § 16.

¹⁵ *United States v. Armstrong*, 517 U.S. 456, 464 (1996); *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978); *United States v. Moore*, 543 F.3d 891 (7th Cir. 2008); *Cain v. State*, 955 N.E.2d 714, 718 (Ind. 2011); *Corcoran v. State*, 739 N.E.2d 649, 654 (Ind. 2000); *Lamotte v. State*, 495 N.E.2d 729, 733 (Ind. 1986); *Marbley v. State*, 461 N.E.2d 1102, 1109 (Ind. 1984); *Schiro v. State*, 888 N.E.2d 828, 834 (Ind. Ct. App. 2008); *Deurloo v. State*, 690 N.E.2d 1210, 1211 (Ind. Ct. App. 1998); *Burst v. State*, 499 N.E.2d 1140, 1147 (Ind. Ct. App. 1986).

¹⁶ IND. CODE § 33-39.

¹⁷ *Lamotte v. State*, 495 N.E.2d 729, 733 (Ind. 1986); *Moala v. State*, 969 N.E.2d 1061, 1067 (Ind. Ct. App. 2012), *Worthington v. State*, 409 N.E.2d 1261, 1268 (Ind. Ct. App. 1980); *Brune v. Marshall*, 350 N.E.2d 661, 662 (Ind. Ct. App. 1976); *see also United States v. Williams*, 504 U.S. 36, 48 (1992) (stating prosecutors do not require the approval of the court to seek an indictment by grand jury); *United States v. Jackson*, 189 F.3d 655, 661 (7th Cir. 1999) (stating if probable cause exists, the decision to prosecute is covered by prosecutorial discretion), *overruled on other grounds by United States v. Buford*, 201 F.3d 937 (7th Cir.).

¹⁸ *Dorsey v. State*, 490 N.E.2d 260, 268 (Ind. 1986); *Compton v. State*, 465 N.E.2d 711, 713 (Ind. 1984); *Jones v. State*, 438 N.E.2d 972, 975 (Ind. 1982); *Moala v. State*, 969 N.E.2d 1061, 1067 (Ind. Ct. App. 2012)

¹⁹ *Harris v. State*, 824 N.E.2d 432, 438 (Ind. Ct. App. 2005); *State v. Sagalovsky*, 836 N.E.2d 260, 265 (Ind. Ct. App. 2005).

should not be offered,²¹ and whether to recommend a sentence to the court.²² The Indiana Court of Appeals has held that “absolute discretion rests in the State to determine the crime with which a defendant will be charged,”²³ and the Indiana Supreme Court has stated that determining the person or persons to be charged lies within the “sole discretion of the prosecuting attorney.”²⁴

Prosecuting attorneys are granted this wide spectrum of discretion in order to uphold the “public order,”²⁵ and to enable the “due administration of public justice.”²⁶ Exercise of a prosecutor’s discretion is not reviewable by the courts in most situations,²⁷ and prosecuting attorneys necessarily are protected by absolute immunity from civil liability for the exercise of their forensic discretion.²⁸ However, it should be noted that federal law grants prosecutors only qualified immunity in the exercise of their investigative functions.²⁹ This issue, and where the line demarcating where absolute immunity ends and qualified immunity begins, has not been addressed in Indiana.

Prosecuting attorneys are often called “judicial officers”³⁰ due to their positions within the judicial system and the array of discretionary powers with which they are vested. While the

²⁰ Cain v. State, 955 N.E.2d 714, 718 (Ind. 2011); Corcoran v. State, 739 N.E.2d 649, 654 (Ind. 2000); Lamotte v. State, 495 N.E.2d 729, 733 (Ind. 1986).

²¹ Cain v. State, 955 N.E.2d 714, 718 (Ind. 2011); Corcoran v. State, 739 N.E.2d 649, 654 (Ind. 2000); Lockhart v. State, 274 N.E.2d 523, 526 (1971).

²² Lockhart v. State, 274 N.E.2d 523, 526 (Ind. 1971).

²³ Harris v. State, 762 N.E.2d 163, FN1 (Ind. Ct. App. 2002).

²⁴ Lamotte v. State, 495 N.E.2d 729, 733 (Ind. 1986); *see also* Eukers v. State, 728 N.E.2d 219, 223 (Ind. Ct. App. 2000) (stating that “[i]t is well-settled that the decision whether to prosecute lies within the prosecutor’s sole discretion.”) (internal citation omitted).

²⁵ *See* State ex rel. Egan v. Superior Court, 6 N.E.2d 945, 947 (1937) (explaining that this discretionary power is too vital to the interest of public order to be subjected to restraint by the courts).

²⁶ Hartsock v. Reddick, 6 Blackf. 255, 256 (Ind. 1842) (holding that immunity from civil liability for slander or libel in filing criminal charges is necessary to preserve the due administration of public justice).

²⁷ State ex rel. Egan v. Superior Court, 6 N.E.2d 945, 947 (Ind. 1937); *see also* United States v. Flemmi, 225 F.3d 78, 86 (1st Cir. 2000) (stating that “the decision to prosecute (or, conversely to forbear) is largely unreviewable by the courts”).

²⁸ Griffith v. Slinkard, 44 N.E. 1001, 1002 (1896); *see also* Foster v. Percy, 387 N.E.2d 446j, 448 (1979).

²⁹ *See* Buckley v. Fitzsimmons, 509 U.S. 259 (1993); Burns v. Reed, 500 U.S. 478 (1991); Imbler v. Pachtman, 424 U.S. 409 (1976).

³⁰ Foster v. Percy, 387 N.E.2d 446, 448 (Ind. 1979); State ex rel. Latham v. Spencer Circuit Court, 194 N.E.2d 606, 608 (Ind. 1963); Tinder v. Music Operating, Inc., 142 N.E.2d 610, 617 (Ind. 1957); State ex rel. Stanton v. Murray,

section of the Indiana Constitution that establishes the prosecuting attorney lies within the judiciary article, prosecutors are not, in fact, members of the judicial branch. However, the protection afforded prosecuting attorneys against civil liability when exercising their authority to fulfill their responsibilities is analogous to members of the judicial branch because of the consequences of their decisions. The Indiana Supreme Court explains:

The prosecuting attorney, therefore, is a judicial officer, but not in the sense of a judge of a court. The rule applicable to such an officer is thus stated by an eminent author:

Whenever duties of a judicial nature are imposed upon a public officer, the due execution of which depends upon his own judgment, he is exempt from all responsibility by action for the motives which influence him and the manner in which said duties are performed. If corrupt, he may be impeached or indicted; but he cannot be prosecuted by an individual to obtain redress for the wrong which may have been done. No public officer is responsible in a civil suit for a judicial determination, however erroneous it may be, and however malicious the motive which produced it.³¹

While a prosecutor is not in fact a “true” judicial officer in the sense of being a member of the judiciary branch, prosecutors nonetheless function in a quasi-judicial role. Historically, the prosecutor’s office was “carved out of that of the common-law office of attorney general, who originally discharged all the duties now devolving on the two officers.”³² By virtue of being an officer as set forth in the Indiana constitution,³³ a prosecuting attorney’s exercise of official

108 N.E.2d 251, 256 (Ind. 1952); *State ex rel. Spencer v. Criminal Court*, 15 N.E.2d 1020, 1022 (Ind. 1938); *State ex rel. Williams v. Ellis*, 112 N.E. 98, 100 (Ind. 1916); *Griffith v. Slinkard*, 44 N.E. 1001, 1002 (Ind. 1896); *State v. Henning*, 33 Ind. 189, 191 (1870); *Spalding v. State*, 330 N.E.2d 774, 776 (Ind. Ct. App. 1975).

³¹ *Griffith v. Slinkard*, 44 N.E. 1001, 1002 (Ind. 1896); *See also*, *Foster v. Percy*, 387 N.E.2d 446, 448 (1979).

³² *State ex rel. Williams v. Ellis*, 112 N.E. 98, 100 (Ind. 1916).

³³ IND. CONST., ART. 7, § 16.

discretion is checked only by the electorate.³⁴ Accordingly, the judicial branch may not interfere with a prosecutor's exercise of his or her official discretion.³⁵

II. DISCRETIONARY POWERS

A. Charging Discretion

Recall that a prosecuting attorney's broad discretionary powers concern all aspects of the criminal process, including the filing of a particular charge,³⁶ the prosecution of a particular person,³⁷ or commencement of a criminal investigation.³⁸ Courts have no authority to order a prosecuting attorney to file charges if he or she refrains from doing so. As the Indiana Court of Appeals has stated, "whether to prosecute at all and what charges to bring are generally decisions within the prosecutor's discretion."³⁹ Additionally, if a prosecuting attorney wishes to dismiss a charge, "the trial court has no discretion to deny such motion."⁴⁰ The Indiana Supreme Court weighed in on a prosecutor's rejection of charges in *State ex rel. Freed v. Circuit Court of Martin County*,⁴¹ where the prosecuting attorney refused to approve an affidavit as the basis for a criminal prosecution. The affiant petitioned the trial court for a writ of mandamus and the circuit court assumed jurisdiction over the matter, ordering the prosecutor to sign and approve the affidavit. The prosecutor appealed to the Indiana Supreme Court, seeking a writ of prohibition, which was granted. In issuing their ruling, the Supreme Court stated that "[c]riminal prosecutions cannot be instituted by private individuals," and the trial court "had no jurisdiction

³⁴ King v. State, 397 N.E.2d 1260, 1265 (Ind. Ct. App. 1979).

³⁵ State ex rel. Egan v. Superior Court, 6 N.E.2d 945, 947 (Ind. 1937).

³⁶ Lamotte, 495 N.E.2d at 733; Moala, 969 N.E.2d at 1067; Worthington, 409 N.E.2d at 1268; Brune, 350 N.E.2d at 662; see also Williams, 504 U.S. at 48; Jackson, 189 F.3d at 661.

³⁷ Cain, 955 N.E.2d at 718; Corcoran, 739 N.E.2d at 654; Lamotte, 495 N.E.2d at 733.

³⁸ State ex rel. Spencer v. Criminal Court, 15 N.E.2d 1020, 1022 (Ind. 1938).

³⁹ Moala, 969 N.E.2d at 1067

⁴⁰ Id.

⁴¹ State ex rel. Freed v. Circuit Court of Martin County, 14 N.E.2d 910 (Ind. 1938).

to entertain or pass upon the petition for an order requiring the prosecutor to approve the affidavit.”⁴² The Court elaborated further on their reasoning, explaining:

The public policy, evidenced by the requirement that the affidavit must be approved by the prosecuting attorney, is apparent in former statutes. Its purpose is to protect citizens against criminal actions until the charges are investigated and the prosecution approved by the officer who is by law vested with jurisdiction to act for the state. This officer is not the judge. It is the prosecuting attorney. Jurisdiction to approve, and thus make possible, the prosecution of criminal actions lies with the grand jury or the prosecuting attorney, and not elsewhere.⁴³

In Indiana, prosecutors have great flexibility when filing and dismissing charges. A prosecuting attorney has the freedom to dismiss a charge and subsequently refile the charge or select a different, possibly more appropriate, charge.⁴⁴ The Indiana Code requires a court to grant a prosecuting attorney’s motion for dismissal of charges as long as the prosecutor states his or her reasons for dismissal.⁴⁵ It is not up to the court to judge the merits or the wisdom of a motion for dismissal; courts must grant the motion if the prosecuting attorney complies with the Indiana Code and provides grounds for the dismissal.⁴⁶

B. Choice of Charges

When reviewing the facts of a case, if a prosecutor determines that at least two offenses may have been committed, the prosecutor may choose which charges (if any) should be filed. A prosecutor may exercise this discretion at any point in the investigation of the case, regardless of the charge under which the suspect was originally arrested. Prosecuting attorneys may then file

⁴² *Id.*

⁴³ *Id.* at 911.

⁴⁴ Refiling the same charge is allowable provided it does not materially prejudice the defendant. *Hollowell v. State*, 773 N.E.2d 326 (Ind. Ct. App. 2002).

⁴⁵ IND. CODE § 35-34-1-13

⁴⁶ *Swinehart v. State*, 376 N.E.2d 486, 489 (Ind. 1978); *Maxey v. State*, 353 N.E.2d 457, 461 (Ind. 1976); It is important to note, however, that prosecutors may not use their dismal discretion in order to circumvent trial court orders or rulings.

any charge they feel is supported by the facts presented.⁴⁷ The discretion of a prosecuting attorney when choosing the charge to be filed is broad and a prosecutor may file a charge of a lesser included offense even if facts are present that would undoubtedly support prosecution of the more serious offense.⁴⁸ It is also possible and permissible for a prosecuting attorney to carefully draft a charge in such a way that the defendant is precluded from conviction of a lesser included offense.⁴⁹ Additionally, if criminal conduct falls under multiple statutes, the prosecutor has the discretion to prosecute the defendant on any or all of the appropriate statutes, even if the penalties are dissimilar.⁵⁰

C. Joinder

The Indiana Code provides a prosecuting attorney with the discretion to join two or more offenses in the same indictment or information if the offenses are of the same or similar character, even if not part of a single scheme or plan.⁵¹ This joinder is optional, and not mandatory.⁵² Prosecutors are also permitted to join two or more offenses if the offenses are

⁴⁷ *Moody v. State*, 448 N.E.2d 660, 663 (Ind. 1983) (“[T]he facts and circumstances of which the arresting officer has knowledge that give him probable cause to believe a crime has been committed, need not be the same crime with which the defendant is ultimately charged”); *Smith v. State*, 271 N.E.2d 133, 137 (Ind. 1971) (when officers stated that the arrest was for a traffic offense and the defendant was later charged with burglary, the Court found that “[t]he fact the police officers testified that prior to the seizure of the evidence they had formally arrested appellant only for a traffic offense does not require a different result”); *Jenkins v. State*, 361 N.E.2d 164, 166-67 (Ind. Ct. App. 1977) (arrest for threatening an officer with a weapon and conviction for possession of heroin).

⁴⁸ *Taylor v. State*, 236 N.E.2d 825, 827 (1968) (prosecutor had discretion to charge robbery, a lesser included offense in the crime of commission of a felony while armed); *Massey v. State*, 803 N.E.2d 1133, 1138 (Ind. Ct. App. 2004) (prosecutor may charge a defendant with both a greater and a lesser included offense even though defendant cannot be convicted of both offenses).

⁴⁹ *Roberts v. State*, 894 N.E.2d 1018, 1028-29 (Ind. Ct. App.), *trans. denied*, 898 N.E.2d 1233 (Ind. 2008) (prosecutor has the discretion to draft a charge of murder in a manner that forecloses the opportunity for the defendant to seek a conviction on a lesser offense that is not inherently included; involuntary manslaughter is not an inherently lesser included offense of murder; here the charge of murder did not contain any reference to a battery that could have been a basis for an involuntary murder offense).

⁵⁰ *U.S. v. Batchelder*, 442 U.S. 114, 123-25 (1979); *see also State v. Dugan*, 793 N.E.2d 1034, 1039-40 (Ind. 2003) (stating that when misconduct may be charged under multiple statutes, the state has the discretion of prosecuting under any or all of the applicable statutes; the offense of receiving a gratuity from a person applying for a permit to deal in alcoholic beverages may be charged as an offense under the Alcoholic beverage Code or as an act of official misconduct, at the prosecutor’s discretion).

⁵¹ IND. CODE § 35-34-1-9(a)(1)

⁵² *Seay v. State*, 550 N.E.2d 1284, 1287 (Ind.1990)

based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan.⁵³ However, joinder of offenses of this nature is still permissive only and not mandatory, even if the offenses arise out of the same transaction.⁵⁴

The Indiana Code also allows a prosecuting attorney to join two or more defendants in the same indictment or information if each defendant is charged with each offense included in the charging instrument.⁵⁵ When charging conspiracy, a prosecuting attorney may join each of the defendants when “each of the defendants is charged as a conspirator or party to the commission of the offense and some of the defendants are also charged with one or more offenses alleged to be in furtherance of the conspiracy or common scheme or plan,”⁵⁶ despite a party to the commission of an offense or conspirator not being designated as such.⁵⁷ Even if conspiracy is not charged and not all defendants are charged in each count, the defendants may be joined if the offenses were part of a common scheme or plan or were so closely connected in respect to time, place, and occasion that it would be difficult to separate proof of one charge from proof of the others.⁵⁸

D. Charging Method and Grand Jury Limitations

Any criminal offense may be prosecuted in Indiana by either a grand jury indictment or a prosecuting attorney’s information.⁵⁹ While the Fifth Amendment of the United States Constitution requires all felonies be prosecuted by a grand jury indictment or presentment, the

⁵³ IND. CODE § 35-34-1-9(b)(2); *see, e.g.*, *Massey v. State*, 803 N.E.2d 1133, 1138 (Ind. Ct. App. 2004) (holding that a prosecutor may charge a defendant with both a lesser and greater included offense, but that convictions for both offenses may not stand, *citing* *Bunting v. State*, 731 N.E.2d 31, 35 (Ind. Ct. App. 2000))

⁵⁴ *Seay v. State*, 550 N.E.2d 1284, 1288 (Ind.1990); *Webb v. State*, 453 N.E.2d 180, 184–85 (Ind.1983); *Martakis v. State*, 450 N.E.2d 128, 129 n. 1 (Ind. App. 3d Dist. 1983); *State v. Burke*, 443 N.E.2d 859, 861–62 (Ind. App. 3d Dist. 1983); *Snodgrass v. State*, 182 Ind.App. 473, 476–77, 395 N.E.2d 816, 818 (2d Dist. 1979).

⁵⁵ IND. CODE § 35-34-1-9(b)(1)

⁵⁶ IND. CODE § 35-34-1-9(b)(2)

⁵⁷ *Id.*

⁵⁸ IND. CODE § 35-34-1-9(b)(3)

⁵⁹ IND. CODE § 35-34-1-1(a)

Supreme Court of the United States held the provision inapplicable to the states, finding themselves “unable to say that the substitution for a presentment or indictment by a grand jury of the proceeding by information after examination and commitment by a magistrate...is not due process of law.”⁶⁰ The Indiana Supreme Court has since applied this principle,⁶¹ and Indiana prosecutors therefore have complete discretion in deciding the manner in which prosecution may be commenced. This discretion applies to all offenses, including capital murder.⁶²

After submitting a matter to a grand jury for consideration, a prosecutor may, in certain circumstances, be prohibited from further action. If, after the matter has been submitted to a grand jury for consideration, the grand jury has voted to take no action on the matter, a prosecutor is statutorily prohibited from filing another information⁶³ or obtaining a grand jury indictment⁶⁴ concerning the offense on which the grand jury decided to take no action. In such a case, only if a prosecutor can demonstrate that an information or indictment is founded on newly discovered material evidence not originally presented to the grand jury may the prosecutor file a new information⁶⁵ or seek a grand jury indictment.⁶⁶

III. DISCRETIONARY LIMITATIONS

A. General Limitations

As discussed above, prosecuting attorneys are often referred to as “judicial officers” but their discretionary decisions are nevertheless generally not subject to judicial review because of

⁶⁰ *Hurtado v. California*, 110 U.S. 516, 538 (1884)

⁶¹ *Beverly v. State*, 543 N.E.2d 1111, 1116 (Ind. 1989); *State v. Boswell*, 4 N.E. 675 (Ind. 1886), *overruled by* *Lankford v. State* 43 N.E. 444 (Ind. 1896) (“[E]ven if a grand jury had been in session since appellant’s arrest, and had been discharged without indicting him, it is no reason why he may not be prosecuted by affidavit and information.”)

⁶² *Townsend v. State*, 533 N.E.2d 1215, 1221 (Ind. 1989); *Bieghler v. State*, 481 N.E.2d 78, 94 (Ind. 1985), *cert. denied*, 475 U.S. 1031(1986); *Scruggs v. Allen County/Town of Fort Wayne*, 829 N.E.2d 1049, 1051 (Ind. Ct. App. 2005)

⁶³ IND. CODE § 35-34-1-6(b)

⁶⁴ IND. CODE § 35-34-2-12(d)

⁶⁵ IND. CODE § 35-34-1-6(b)

⁶⁶ IND. CODE § 35-34-2-12(d)

the separation of powers doctrine. At the same time, however, a prosecuting attorney is an “officer of the court”⁶⁷ and is therefore subject to at least some supervision by the judicial branch of government. In *State ex rel. Latham v. Spencer Circuit Court*,⁶⁸ for example, the Indiana Supreme Court stated that a prosecuting attorney’s conduct in the trial of cases is subject to judicial supervision the same as that of any other attorney. The court stated:

A prosecuting attorney is a judicial officer (*State v. Henning*, 1870, 33 Ind. 189), and an officer of the court (*People ex rel. Hughes v. May*, 1855, 3 Mich. 598, 605), and while his official duties comprehend a wider field than those of an attorney solely, his conduct in the trial of causes is subject to fully as high standards and scrutiny as is that of attorneys generally. The preservation of proper standards of conduct by attorneys and prosecuting attorneys as to matters pending in the court is a proper subject for the courts, which are charged with the control of the judicial branch of the government.⁶⁹

A prosecuting attorney is therefore subject to the provisions of the Indiana Rules of Professional Conduct as set forth by the Indiana Supreme Court. In particular, a prosecuting attorney’s charging discretion is subject to the limitation that a prosecutor must “refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause.”⁷⁰ Furthermore, a prosecuting attorney must not engage in professional misconduct such as “conduct involving dishonesty, fraud, deceit or misrepresentation”⁷¹ or “conduct that is prejudicial to the administration of justice.”⁷² In fact, the commentary that accompanies the Rules of Professional Conduct suggests that a prosecuting attorney’s “systematic abuse of prosecutorial discretion” could constitute professional misconduct under the Rules.⁷³

⁶⁷ *Hackett v. State*, 360 N.E.2d 1000, 1003 (1977); *State ex rel. Latham v. Spencer Circuit Court*, 194 N.E.2d 606, 608 (Ind. 1963); *State ex rel. Williams v. Ellis*, 112 N.E. 98, 100 (Ind. 1916).

⁶⁸ *State ex rel. Latham v. Spencer Circuit Court*, 194 N.E.2d 606 (Ind. 1963).

⁶⁹ *Id.*

⁷⁰ IND. RULES OF PROF’L CONDUCT, R. 3.8(a).

⁷¹ IND. RULES OF PROF’L CONDUCT, R. 8.4(c).

⁷² IND. RULES OF PROF’L CONDUCT, R. 8.4(d).

⁷³ IND. RULES OF PROF’L CONDUCT, R. 3.8 cmt.

A prosecuting attorney's exercise of discretion is likewise subject to certain limitations prescribed by legislative action. For example, a prosecuting attorney appears to be subject to the legislative provision that an attorney has the duty "[n]ot to encourage either the commencement or the continuance of an action or proceeding from any motive of passion or interest."⁷⁴ In addition, a prosecuting attorney is subject to criminal prosecution for the violation of statutory provisions concerning offenses such as official misconduct⁷⁵ and bribery.⁷⁶ Finally, a prosecuting attorney is subject to impeachment or removal from office after being convicted of "corruption or any other high crime."⁷⁷

In addition to being subject to these general limitations, prosecutorial discretion is subject to a number of specific limitations that have been created by either judicial or legislative action. A prosecuting attorney is generally required to exercise his or her prosecutorial discretion fairly and in good faith.⁷⁸ In considering a criminal matter, a prosecuting attorney is required to act "with the same impartiality as the judge does throughout all preliminaries and the trial of the cause itself."⁷⁹ A prosecuting attorney has a responsibility to consider not only the State's

⁷⁴ IND. CODE § 33-43-1-3(7).

⁷⁵ IND. CODE § 35-44.1-1-1.

⁷⁶ IND. CODE § 35-44.1-1-2.

⁷⁷ IND. CONST., Art. 7, § 13; IND. CODE § 5-8-1-19. The Indiana General Assembly has also provided for the impeachment of prosecuting attorneys "for any misdemeanor in office," IND. CODE § 5-8-1-1, and has authorized the filings of charges against a prosecuting attorney for "collecting illegal fees" or "refusing or neglecting to perform the official duties to his office," IND. CODE § 5-8-1-35. These provisions apparently were adopted in accordance with Indiana Constitution, Art. 6, §§ 7 and 8, which provide for the impeachment of state and county officers. The provisions are therefore invalid insofar as they apply to prosecuting attorneys because the Indiana Supreme Court has held that a prosecuting attorney is a constitutional officer, as opposed to a state or county officer, and may be removed only as provided in Indiana Const., Art. 7, § 13. *State v. Patterson*, 105 N.E. 228 (Ind. 1914). A "high crime" is not necessarily a crime that constitutes a felony, but is "a crime of an infamous nature contrary to public morality" according to Merriam-Webster. Many scholars also suggest that the contextual understanding of "high" as used by the framers would indicate a crime committed by a person in a "high" position; not a serious crime.

⁷⁸ *Highland Sales Corp. v. Vance*, 186 N.E.2d 682, 689 (Ind. 1962).

⁷⁹ *Palmer v. State*, 288 N.E.2d 739, 755 (Ind. Ct. App. 1972).

interests but also the accused person's interests when exercising prosecutorial discretion. As stated by the Indiana Court of Appeals in *Palmer v. State*:⁸⁰

It is the duty of the Prosecuting Attorney to represent the person charged with crime with the same zeal and vigor that he may later use for the State in the trial of the cause, to see that that person is not erroneously charged, tried, and convicted, and that all his rights and his freedom are protected....⁸¹

When a prosecuting attorney violates this basic obligation to an accused person and files criminal charges in bad faith or because of some corrupt intent or motive, the charges may in fact be subject to a motion to dismiss. The Indiana Supreme Court has suggested, however, that a defendant must meet a heavy burden in order to establish the basis for such relief, stating:

We do not minimize the duty of the prosecuting attorney to exercise the power of his office fairly and in good faith. However, in order to warrant judicial interference with the office of the prosecuting attorney because of either nonfeasance or malfeasance, it must be made to appear from the facts alleged that such misconduct consists of a gross and intentional failure or refusal to enforce the law in some major area or that such misconduct is actually the product of bad faith or evil design....⁸²

Bad faith or a corrupt intent may be shown to exist in many different ways, but the Indiana appellate courts have generally considered prosecutorial misconduct in the context of prosecutorial vindictiveness, selective prosecution, and discriminatory prosecution. For further discussion on forms of prosecutorial misconduct and limitations on a prosecutor's powers of discretion, please reference the citations provided below.

B. Prosecutorial Vindictiveness

Vindictive prosecution occurs, according to the Indiana Supreme Court, when "[a] prosecutor's charging decision was motivated by a desire to punish a person because he has done

⁸⁰ *Palmer v. State*, 288 N.E.2d 739 (Ind. Ct. App.).

⁸¹ *Palmer*, 288 N.E.2d at 755

⁸² *Highland Sales Corp.*, 186 N.E.2d at 689.

what the law plainly allows him to do.”⁸³ These situations most frequently arise in instances where a prosecutor files charges in retaliation for a person (usually a defendant) relying on a constitutional right during the course of a criminal proceeding. The Indiana Supreme Court’s holding is informed by a series of cases stemming from *North Carolina v. Pearce*⁸⁴ and culminating in *Bordenkircher v. Hayes*.⁸⁵

Bordenkircher reiterates the principle that “so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.”⁸⁶ The Court acknowledges that, “‘the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation’ so long as ‘the selection was [not] deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification.’”⁸⁷

In *Blackledge v. Perry*,⁸⁸ the Supreme Court of the United States weighed in on a situation where a prosecutor filed felony charges against a defendant who had requested an appeal in a trial *de novo* after conviction on misdemeanor charges in a non-jury trial. The Supreme Court stated that,

...A person convicted of an offense is entitled to pursue his statutory right to a trial *de novo*, without apprehension that the State will retaliate by substituting a more serious charge for the original one, thus subjecting him to a significantly increased potential period of incarceration....⁸⁹

Furthermore, the Supreme Court placed emphasis on the fact that a defendant need not prove actual vindictiveness, remarking that there was no direct evidence in the case that the prosecutor

⁸³ Jones v. State, 540 N.E.2d 1228, 1229 (1989).

⁸⁴ North Carolina v. Pearce, 395 U.S. 711 (1969).

⁸⁵ Bordenkircher v. Hayes, 434 U.S. 357 (1978).

⁸⁶ *Id.* at 364.

⁸⁷ *Id.* (citing Oyler v. Boyles, 368 U.S. 448, 456 (1962)).

⁸⁸ Blackledge v. Perry, 417 U.S. 21 (1974).

⁸⁹ *Id.* at

acted in bad faith or with malicious intent. Instead, the court reiterated its holding from a previous case, stating,

The rationale of our judgment in the Pearce case, however, was not grounded upon the proposition that actual retaliatory motivation must exist. Rather we emphasized that ‘since the fear of such vindictiveness may unconstitutionally deter a defendant’s exercise of the right to appeal or collaterally attack his first conviction, due process also requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge.’⁹⁰

Thus, all that is necessary is that a defendant demonstrate that a prosecutor acted in a manner so as to cause a reasonable apprehension of vindictiveness.

The Indiana Supreme Court later applied the holding of the *Blackledge* case in *Cherry v. State*.⁹¹ In *Cherry*, the defendant was charged with rape and criminal deviate conduct. The prosecutor also sought habitual offender status for the defendant. The defendant moved to sever the rape charge, and defendant’s motion was granted. The state subsequently indicated it would only try defendant on the criminal deviate conduct and habitual offender charges. The jury trial resulted in a conviction on the criminal deviate conduct charge, but the jury was unable to reach a verdict on the habitual offender charge. The trial court sentenced defendant to forty years’ imprisonment after determining aggravating circumstances existed. After sentencing, the prosecutor motioned for dismissal of the rape and habitual offender charges, and the motion was granted by the trial court.

Following the trial, the defendant filed a motion to correct errors which was granted by the court, and defendant was granted a new trial. The prosecutor immediately refiled the previously dismissed charges, and the defendant was convicted on all three charges at the second trial. The trial court again found aggravating circumstances existed, and sentenced the defendant

⁹⁰ *Id.* at

⁹¹ *Cherry v. State*, 414 N.E.2d 301 (Ind. 1981).

to a total of sixty years' imprisonment. The defendant then appealed his conviction on grounds of violation of due process.

The Indiana Supreme Court found that “the timing of the state’s actions in [the] case [did] raise a serious due process question”⁹² since the refiling of charges took place after the defendant sought and was granted a new trial. The court held that:

When the prosecution has occasion to file more numerous or more severe charges for the same basic criminal conduct against an accused *after* the accused has successfully exercised his statutory or constitutional rights to an appeal, the prosecution bears a heavy burden of providing that any increase in the number or severity of the charge was not motivated by a vindictive purpose.⁹³

The court stated that absent some sort of “unusual circumstances...such as the discovery of additional evidence, elements of the crime being completed which were not complete at the time of the first trial, or an honest mistake or oversight being made at the time of the original decision to prosecute,”⁹⁴ a presumption of vindictiveness will not be overcome. A finding of actual vindictiveness, bad faith, or malice is not required for a defendant to prevail on an allegation of vindictive prosecution. All that is needed is a “realistic apprehension of vindictiveness, rather than vindictiveness in fact.”⁹⁵ The Indiana Supreme Court’s primary concern in its reversal was to prevent the “chilling effect” of the appearance of vindictive prosecution, and to guard against giving “too much deference to prosecutorial discretion.”⁹⁶

As the previous cases demonstrate, the timing of the filing or refiling of criminal charges is of utmost importance in analyzing allegations of prosecutorial vindictiveness. While there is a presumption of vindictive prosecution when a prosecutor files or refiles charges following a

⁹² *Id.* at 305.

⁹³ *Id.*

⁹⁴ *Id.* at 305-306.

⁹⁵ *Id.* at 306.

⁹⁶ *Id.* See also *Murphy v. State*, 453 N.E.2d 219, 227 (Ind. 1983) (holding that when defendant successfully obtained a mistrial in his first trial, the prosecutor could not subsequently add habitual offender charge, thereby attempting “to coerce Defendant into foregoing [sic] his right to a fair trial or wield [the habitual offender charge] thereafter to punish him for not having done so.”)

criminal trial, the burden shifts to the defendant when allegations of vindictive prosecution are made based on the prosecutor's actions in the pre-trial phase of criminal proceedings. The case of *United States v. Goodwin*⁹⁷ provides an illustrative example.

In *Goodwin*, the defendant was charged with multiple misdemeanor offenses stemming from a traffic stop for speeding. The defendant, Goodwin, fled the scene of the stop, striking the officer as he sped away. The officer filed a complaint the following day, and Goodwin was arrested and arraigned. Before the defendant could be tried, he fled the jurisdiction. Authorities found Goodwin three years later, and Goodwin's trial was set before a United States Magistrate. After initially beginning plea negotiations with the prosecutor, the defendant later informed the Government that he would no longer plead guilty, and instead requested a trial by jury. The defendant's case was transferred to the District Court, and a new Assistant United States Attorney assumed responsibility for the case. After review, the Assistant United States Attorney sought and obtained a four-count indictment, including a felony count of forcible assault of a federal officer. The trial jury then convicted Goodwin on the felony count and one misdemeanor count.

On appeal, Goodwin contended that the indictment on the felony charge constituted prosecutorial vindictiveness. In its ruling, the Supreme Court distinguished between allegations of vindictive prosecution arising out of pre-trial actions and allegations involving actions taken post-trial. The Court explained that "[t]here is good reason to be cautious before adopting an inflexible presumption of prosecutorial vindictiveness in a pretrial setting,"⁹⁸ noting that, for various reasons, a "prosecutor's assessment of the proper extent of prosecution may not have

⁹⁷ *United States v. Goodwin*, 457 U.S. 368 (1982).

⁹⁸ *Id.* at 381.

crystalized.”⁹⁹ The Court concluded that “a change in the charging decision made after an initial trial is completed is much more likely to be improperly motivated than is a pretrial decision.”¹⁰⁰

Indiana’s state courts have also recognized the distinction between pre-trial and post-trial changes in charges, following the reasoning of the Supreme Court of the United States in *Goodwin*. For example, in *State v. Selva*,¹⁰¹ the original charges against the defendant were filed in four separate informations and consisted of a burglary charge and three theft charges. Prior to trial, the prosecutor filed a motion to consolidate all four charges. The defendant, Selva, opposed the motion, and the trial court denied the motion to consolidate. Following the trial court’s denial of the motion to consolidate charges, the prosecutor dismissed all four of the separate charges, and refiled a new, ten-count information that contained the original four charges and six additional charges. Selva then filed a motion to dismiss the ten-count information, citing prosecutorial vindictiveness as the grounds for the dismissal. Following a hearing, the trial court dismissed the ten-count information and reinstated the original four cases.

On appeal, the Indiana Court of Appeals acknowledged that the United States Supreme Court has given increased deference to prosecutorial discretion in pre-trial filings. However, the court also pointed out that though there would be no presumption of vindictiveness, “a defendant might be able to prove actual vindictiveness if ‘the prosecutor’s charging decision was motivated by a desire to punish him for doing something that the law plainly allowed him to do...’”¹⁰² The Court of Appeals held that there was indeed enough evidence to support the trial court’s decision that the additional charges were vindictive in nature. However, the Court of Appeals *did*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *State v. Selva*, 444 N.E.2d 329 (Ind. Ct. App. 1983).

¹⁰² *Id.* at 330.

reinstate the original four charges, as there was no indication that the original four charges were filed out of prosecutorial vindictiveness.

The case *Cox v. State*¹⁰³ also involves allegations of vindictive prosecution in pre-trial court filings. In *Cox*, the prosecutor filed a murder for hire charge seven months after the original charge of murder. The defendant alleged the filing was vindictive and in retaliation for his filing requesting an early trial on the original charge. However, the Indiana Supreme Court points to *Goodwin*, which held that a defendant is not entitled to a “presumption of prosecutorial vindictiveness when enhances charges are filed following a defendant’s assertion of his right to a jury trial.”¹⁰⁴ Accordingly, the Indiana Supreme Court held:

The appellant has not shown that the charging decision was motivated by a desire to punish appellant for doing something the law allowed him to do. The additional charge was one the State had a legitimate right to file. The fact the State waited until the additional corroborative evidence came forth does not equate with misconduct. The trial court did not err in denying the motion to dismiss.¹⁰⁵

C. Selective Prosecution

Selective prosecution occurs:

...when other violators similarly situated are generally not prosecuted, that the selection of the claimant was intentional or purposeful, and that the selection was pursuant to an arbitrary classification, including classification based upon race, religion, sex, or other constitutionally suspect distinction that bears no rational relationship to legitimate law enforcement objectives.¹⁰⁶

Such prosecution is a violation of an individual’s due process rights. The Supreme Court of the United States has held that “the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation.”¹⁰⁷ Instead, the selection must be deliberately “based

¹⁰³ *Cox v. State*, 475 N.E.2d 664 (Ind. 1985).

¹⁰⁴ *Id.* at 671.

¹⁰⁵ *Id.*

¹⁰⁶ 8 Ind. Law Encyc. Criminal Law § 14

¹⁰⁷ *Oyler v. Boles*, 368 U.S. 448, 456 (1962)

upon an unjustifiable standard such as race, religion, or other arbitrary classification deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification.”¹⁰⁸ The Supreme Court put the rule into practice in *Oyler v. Boles*,¹⁰⁹ where the Court found that a failure to prosecute other similarly situated individuals simply because of a lack of knowledge of prior offenses does not deny equal protection as selective prosecution.¹¹⁰ As this is a subject not often touched in Indiana jurisprudence, the Indiana Supreme Court found convincing the work of Wayne R. LaFave et al., agreeing that selective or discriminatory prosecution is a matter that “should be treated as an application to the court for a dismissal or quashing of the prosecution” and thus should be decided by the court.¹¹¹ The Indiana Court of Appeals has also drawn from LaFave, finding that “[t]he essential elements of a claim of selective prosecution are: ‘(1) that other violators similarly situated are generally not prosecuted; (2) that the selection of the claimant was ‘intentional or purposeful’; and (3) that the selection was pursuant to an ‘arbitrary classification.’”¹¹²

It appears that the most important element in establishing a prima facie case of selective prosecution for both the Indiana Supreme Court and Indiana Court of Appeals is that there exists an “arbitrary classification,” which is defined as “a classification based upon race, religion, sex or other constitutionally suspect distinction that bears no rational relationship with legitimate law enforcement objectives.”¹¹³

D. Immunity Agreements and Plea Bargaining

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 448.

¹¹⁰ *Id.* at 456.

¹¹¹ Wayne R. LaFave et al., 4 Crim. Proc. § 13.4(a) (3d ed.) (citations omitted); *see also* Love v. State, 468 N.E.2d 519, 522 (Ind. 1984)

¹¹² *Pruitt v. State*, 557 N.E.2d 684, 689 (Ind. Ct. App. 1990) (citation omitted)

¹¹³ *Id.* at 689; *see also* Love, *supra* note 65, at 521 (stating that “the defendant has the burden of proving that he was, in fact, the victim of selective prosecution, based upon ‘an impermissible classification such as race, religion or sex.’” (citation omitted)), *cert. denied*, 471 U.S. 1104 (1985)

Depending on the terms of the agreement, a prosecutor may be prohibited from filing certain charges against an individual after agreeing to an immunity agreement. The Indiana Code provides that prosecutors may grant only use immunity,¹¹⁴ while remaining silent concerning transactional immunity. The Indiana Supreme Court covered this issue in *Abner v. State*,¹¹⁵ holding that an immunity agreement between the prosecutor and a defendant was not binding because the prosecutor had no authority to grant transactional immunity, and even had the prosecutor had such authority, the defendant had violated the terms of the immunity agreement.¹¹⁶ However, the Indiana Supreme Court appeared to backtrack on this ruling a few months later in *Bowers v. State*.¹¹⁷ In *Bowers*, the Court held a transactional immunity agreement was enforceable, emphasizing the importance of “preserv[ing] the integrity and credibility of the criminal justice system while safeguarding a tool valuable to the administration of justice: pre-trial disposition of criminal charges by negotiation between the State and the accused.”¹¹⁸ The Justices further emphasized that a “promise of a state official in his public capacity is a pledge of the public faith and is not to be lightly disregarded,” and thus “by reneging on his promise to abate criminal proceedings, the prosecutor’s conduct impaired the reliability and usefulness of an important prosecutorial tool and tended to undermine the integrity and credibility of the criminal justice system to an extent compelling reversal in this case.”¹¹⁹ While the Indiana Supreme Court claimed the holding did not conflict with their holding in *Abner*,¹²⁰ it is nevertheless difficult to reconcile to two cases.

¹¹⁴ IND. CODE §§ 35-37-3-3; 35-34-2-8

¹¹⁵ *Abner v. State*, 479 N.E.2d 1254 (Ind. 1986)

¹¹⁶ *Id.* at 1258, 59

¹¹⁷ *Bowers v. State*, 500 N.E.2d 203 (Ind. 1986)

¹¹⁸ *Id.* at 204

¹¹⁹ *Id.*

¹²⁰ *Id.*

Similar to immunity agreements, plea agreements may limit a prosecutor's discretion to file criminal charges. Plea agreements are binding contracts between the State and the defendant, and binds both the court and the parties.¹²¹ In fact, the Indiana Code specifically requires a court to grant motions for dismissal of related charges if a defendant pleads guilty and such plea "was entered on the basis of a plea agreement in which the prosecutor agreed to seek or not to oppose dismissal of other related offenses or not to prosecute other potential related offenses."¹²² Such plea agreements are not only binding on the parties of the agreement, but also on prosecutors across county lines.¹²³ Plea agreements are also binding when prosecutors agree to dismiss or refrain from prosecuting unrelated charges if "a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration."¹²⁴

¹²¹ Wright v. State, 700 N.E.2d 1153, 1155 (Ind. Ct. App. 1998).

¹²² IND. CODE § 35-34-1-10(d)

¹²³ See Richardson v. State, 456 N.E.2d 1063 (Ind. Ct. App. 1983).

¹²⁴ Santobello v. New York, 404 U.S. 257, 262 (1971); see also FED. R. CRIM. PRO. 11